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5 Tips For Delivering An Effective Direct-Examination

By **Erin Coe**

Law360, San Diego (April 28, 2014, 3:20 PM ET) -- Direct examination of a witness gives trial lawyers the chance to share their client's side of the story, but to make that testimony believable and ensure it resonates with jurors in the deliberation room, experts say attorneys should keep the spotlight on the witness, use documents to guide the story and deal with any bad facts upfront.

While cross-examinations are widely perceived as more exciting to watch because of the confrontational dynamics at play between the lawyer and the opposing side's witness and the potential for gotcha moments, directs can be just as dramatic, according to Paul Hastings LLP employment partner Marc Bernstein.

"The witness could be very emotional and could be talking about something deeply personal or important, which can be very dramatic," he said. "But lawyers need to remember that it's not about the lawyer scoring points with the jury in a direct-examination. It's about making sure the witness is connecting with the jury in a personal way."

A critical element of any case is getting a witness to perform well during a direct, which often requires significant preparation in advance, according to Rollin Chippey II, a litigation partner at Morgan Lewis & Bockius LLP.

"Ultimately, if the witness in direct-examination has told a believable story on the front end and the jury can relate to the witness, the jurors will be more forgiving of any difficulty a witness may have on cross," he said.

Here, trial lawyers share five tips for presenting a successful direct-examination:

Prep Your Witness

A direct-examination should be a story built around key trial themes, but a witness must be well-prepared to help emphasize those themes and put the facts into context in a way that has an impact, according to lawyers.

"A lot of lawyers assume a witness will do well on direct because it's friendly, and instead try to prepare the witness for a cross, but if lawyers do it that way, they aren't helping the witness," Chippey said. "Job number one is making sure the witness knows the story and is comfortable telling it. If witnesses know the important elements of the story, they will know what they need to protect in cross-examination."

Being a witness can be a physically and emotionally draining exercise, and giving witnesses an idea what questions are going to be asked and letting them articulate their answers will help put them more at ease with the process and appear more confident, according to lawyers.

“If witnesses are shifty-eyed, sweating or coming off in a way that they look uncomfortable, it could look like they are not telling the truth, and that can be devastating,” Bernstein said. “But if witnesses are comfortable, the jury is more likely to identify with them, and they will be more believable.”

Chippey said he usually spends two to three hours prepping a witness for each hour of direct, but in some cases, he will spend weeks, such as one matter where the principal witness for a client was failing to answer critical questions quickly enough and kept hanging his head down.

“I basically spent seven days a week with him for a number of weeks, and he ended up performing admirably at trial,” he said. “The judge thought the witness’s testimony was exceptionally credible, but that didn’t happen overnight. The witness had to be willing to do the work to not only learn the story, but tell it in a way that was understandable and believable.”

Other techniques Chippey has found useful are having the witness testify before family members or other attorneys to get accustomed to talking to an audience or sending witnesses home with a videotape to study their demeanor and work out any kinks.

“Let the witness know that truth equals credibility, and that matters most,” said Hayes Hunt, a commercial litigator at Cozen O’Connor. “Take your witness to a courtroom for your prep and, if possible, take them to the actual courtroom and assuage any fears. Essentially, spend the time with your witness before you call them as a witness.”

Make Your Witness the Star of the Show

Unlike cross-examination, where lawyers are trying to steal the show by tearing down the opposing side’s witness, lawyers in a direction examination are better off getting out of their own way and ensuring the jurors stay focused on the witness.

“Lawyers can make the huge mistake of trying to control the witness on direct by asking too many questions,” Hunt said. “Let the witness tell the story and save the ego for cross-exam.”

Attorneys should try to use shorter and more open-ended questions to encourage the witness to do the talking, and they should ask nonleading questions as well as anticipate potential objections to minimize interruptions from the other side, according to Bernstein.

“You want the witness to shine and present his story in a persuasive and credible way,” he said. “If you are asking long, complicated questions, it becomes about you, not the witness. And if you keep asking questions that are subject to objections, that becomes a distraction from the witness, who’s trying to tell his story.”

The types of questions that lawyers ask and the manner in which they ask them will depend on their witness’s comfort level, experience and public-speaking abilities, according to Kirby Behre, a litigation partner at Paul Hastings. By knowing their witness’s strengths and weaknesses, lawyers can tailor their questions accordingly.

“Find a way for the witness to display his or her favorable personal traits — whether it’s an appropriate sense of humor, excellent memory or expertise,” he said. “A witness’s message is better received if he or she is likeable and believable.”

Keep Jurors (Yawn) Awake

The “deadliest hour” in trial tends to be between 2 and 3 in the afternoon, after jurors have eaten lunch and their attention starts to wane, according to Chippey, but no matter what time it is, lawyers should use whatever techniques they can to keep jurors engaged in the direct-examination.

“Long, boring, technical directs, with leading or contrived questions, are a good way to sink a case,” said Patrick Richard, a commercial trial lawyer at Nossaman LLP.

During trials, Gregory Call, co-chair of Crowell & Moring LLP’s litigation group, always tries to be clear when he is shifting from one topic to the next so that jurors stay on the same page. He also likes to use graphics, design boards and flip charts, and has his witnesses get up and draw on a chart or point to certain terms, rather than simply having them sit and answer questions. And above all, he strives for brevity.

“If you get the reputation that you do your job and do it quickly, jurors are likely to pay attention to what your witnesses say,” he said. “You don’t want jurors thinking, ‘This is going to take forever,’ every time you call a witness. You want to earn the reputation of the lawyer who gets to the point.”

Most cases involve terms and concepts that may be beyond the jurors’ comprehension, and a well-prepared witness should be ready to provide definitions, analogies and demonstrations when needed, according to Chippey.

“Both the witness and attorney need to be attuned to what question is being asked, what is being said and whether it’s being received by the jury,” he said. “Sometimes the lawyer needs to ask the question in a different way or the witness needs to slow down so that the jury understands what is being said.”

Sometimes expert witnesses need to learn how to speak in a less technical way or make use of common analogies to drive home their point. In one case, an expert witness was using a lot of medical jargon to explain a lung disease, and Chippey suggested that he offer an analogy that would be more meaningful to the jury.

“He asked the jury to imagine a 16-lane highway that progressively got smaller and smaller, and he said that when the disease was at its apex, it was like the highway being narrowed down to one lane,” he said. “It was a concept that people could understand.”

Use Documents to Tell the Story

Direct-examinations are important for a case because they are the primary way for lawyers to introduce evidence through both testimony and documents, according to Bernstein.

“You frequently need witnesses to explain or recognize documents to get them admitted into evidence, but I’ve seen lawyers stumble on this,” he said. “There have been cases where the lawyers did not properly figure out how to get documents admitted, and as a result, important documents were left out

of the case."

Because all that jurors can bring back to the deliberation room are the admitted documents, lawyers should use documents as a roadmap so that when the jurors are considering a case, they can remember the testimony based on the documents in front of them, according to Chippey.

"Sometimes, I'll have a witness tell a story and introduce a document to corroborate the testimony, and other times, I'll hand the document to the witness and use it as the basis for explaining the story," he said. "In either event, those documents help cement in the jurors' minds what the witness said."

Address Bad Facts Before Opposing Counsel Does

If the witness wrote a memo or email that could hurt the client's case or gave a deposition that conflicts with the client's version of the facts, it may be safer for witnesses to explain themselves in a direct-examination than let them be grilled for the first time on the issue in a cross-examination, according to Call.

"Your witnesses have to be honest," he said. "If your witnesses have said or done something that needs to be explained, it is better to deal with it on direct when it can be explained. If a witness is whomped on the head by a piece of bad evidence in a cross, the jurors are going to pay attention to it, and it will be harder for the witness to deal with it in that context."

In a breach of contract case involving the purchase of agricultural goods that were exported overseas for human consumption, Call's client alleged the gray-market goods were approved for that purpose, while the defendant argued they were not. Even though it wasn't clear whether the parties engaged in proper conduct under the law, on direct-examination, Call's client admitted he bought the goods for exporting and explained his rationale for why he believed his actions weren't illegal.

But the main witness for the other side claimed that the defendant had no idea what the plaintiff was going to do with the goods once he bought them, according to Call.

"It was a completely incredible position to take because my client told the defendant what he was going to do in emails and at meetings where foreign nationals were present," Call said. "The defendant exposed itself by having a witness take a position that was really hard to ultimately sustain. And as a result, we got a jury verdict on the breach of contract claim for $4 million."

--Editing by Jeremy Barker. and Chris Yates.
